



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: July 17, 2007

CBCA 493

FRED M. LYDA,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Fred M. Lyda, Pro Se, Athens, GA.

Judith A. Bonner, Office of Regional Counsel, General Services Administration,
Philadelphia, PA, counsel for Respondent.

Before Board Judges **PARKER**, **HYATT**, and **DeGRAFF**.

HYATT, Board Judge.

Appellant, Fred M. Lyda, has appealed a contracting officer's decision assessing the amount of \$497 in liquidated damages for his failure to remove a 1995 Chevrolet Caprice that he had purchased on the General Services Administration's (GSA's) internet auction site. Respondent has filed a motion for summary relief, contending that it is entitled to prevail as a matter of law. For the reasons stated herein, we grant respondent's motion and deny the appeal.

Findings of Fact

1. GSA conducted on-line auction sale number 31FBPI06214 in early September 2006. The vehicle in question, item 017, was described as follows:

1995 CHEVY CAPRICE, 4-DR SEDAN, 8 CYL, GAS ENGINE, AT, AC, AIRBAGS, AM/FM RADIO, CC, ABS, PB, PL, PM, PS, PW, REAR DEFROST, TILT STEERING, FABRIC INTERIOR, HUB CAPS, INTERMITTENT WIPERS, COLOR SILVER, EST MI 95,000, VIN 1G1BL52P6SR152895, REPAIRS REQUIRED BUT NOT LIMITED TO: INOPERABLE, NEEDS TO BE TOWED, TRANSMISSION REPAIRS NEEDED, *ORIGINAL FACTORY COMPONENTS MAY HAVE BEEN ALTERED OR REMOVED* THE CONDITION OF THE PROPERTY IS NOT WARRANTED.

Several pictures accompanied the description. Appeal File, Exhibit 3.

2. The vehicle, which was located in Abingdon, Virginia, at the time the auction was conducted, was referred to GSA for sale by the United States Marshals Service in Washington, D.C. Appeal File, Exhibit 1.

3. The terms and conditions of the sale, to which bidders are required to agree in order to register and participate in the auction, included, inter alia, the following:

Condition of Property is not warranted. . . . Deficiencies, when known, have been indicated in the property descriptions. However, absence of any indicated deficiencies does not mean that none exist.

Description Warranty. The Government warrants to the original purchaser that the property listed in the GSAAuctions.gov website will conform to the description. If a misdescription is determined before payment, the contract will be cancelled without any liability to the bidder. If a misdescription is determined before removal of the property, the Government will keep the property and refund any money paid. If a misdescription is determined after removal, the Government will refund any money paid if the purchaser takes the property

at his/her expense to a location specified by the Sales Contracting Officer. The Refund Claim Procedure described below will be strictly followed for filing a claim. . . . **This warranty is in place of all other guarantees and warranties, expressed or implied.**

The Government does not warrant the merchantability of the property or its purpose. The purchaser is not entitled to any payment for loss of profit or any other money damages - special, direct, indirect, or consequential.

Photographs. Photographs may not depict an exact representation of the bid item(s) and should not be relied upon in place of written item descriptions or as a substitute for physical inspection. Please contact the custodian for inspection dates and times.

Inspection. Bidders are invited, urged and cautioned to inspect the property prior to bidding. Bidders must contact the custodian indicated in the item description for inspection dates and times.

Appeal File, Exhibit 2.

4. The online terms and conditions of sale provided for notification of sales results by e-mail. They also contained the following provisions pertaining to default by a successful bidder:

Default. Bidders are cautioned to bid only on items they are prepared to pay for and remove in accordance with the online sale terms and conditions of this sale. Failure to pay for and remove all items awarded within the specified time could result in termination of the contract. The bidder will be subject to paying liquidated damages.

If you are awarded an item on GSA Auctions, you have a responsibility to pay for the item or lot that you were awarded within 2 business days from the date & time the award e-mail notification was sent and promptly remove it before 10 business [days] from the date & time the award e-

mail notification was sent. . . . If you fail to meet either of these two conditions, you will be in violation of the online sale terms and conditions of your contract with the government and will be considered “in default”.

As a defaulted bidder you will be responsible for the payment of liquidated damages, an administrative fee for the processing and re-handling of the item [that] you neglected to pay for and/or remove. The charge will total 20% of the price that was the award amount or \$200, whichever is greater.

Appeal File, Exhibit 2.

5. Appellant submitted the winning bid for this vehicle. By e-mail message dated September 6, 2006, GSA notified Mr. Lyda that he was the successful bidder and instructed him to remit his payment to the regional sales office within two business days of the date and time of the e-mail notification. The notice cautioned that failure to make payment or to remove the property within the specified time frame would constitute a breach of contract, resulting in the termination of the contract and possible assessment of liquidated damages. Appeal File, Exhibit 4.

6. On September 7, 2006, Mr. Lyda paid for the vehicle by credit card. That same date, GSA issued a purchaser's receipt, instructing appellant to remove the vehicle no later than September 20, 2006. Appeal File, Exhibit 8.

7. Mr. Lyda traveled to the vehicle's location in Abingdon, Virginia, on September 14, 2006, to pick it up. Upon arriving in Abingdon and viewing the vehicle for the first time, Mr. Lyda refused to accept delivery of the vehicle. Instead, he wrote to the contracting officer, asking that his credit card account be credited for the purchase price of the vehicle. His complaint was predicated upon what he termed to be obvious defects in the vehicle that should have been, but were not, disclosed in the web site description. Specifically, he identified the following issues: (1) that the windshield wiper had been run as bare metal across the windshield, etching a groove the entire length of the windshield arm and necessitating replacement of the windshield; (2) that the front bumper was warped out of shape and would have to be replaced; (3) the trunk lid had two sizeable dents and several additional smaller ones; (4) three of the four doors on the vehicle had damaged paint and metal, requiring substantial surface repairs and repainting; and (5) given the need to repaint the bumper, trunk, and doors, the entire vehicle would require repainting. Appellant added that these “impediments” were “obvious at a glance” and that had he (and other bidders) been

properly apprised of the true condition of the vehicle, he (and they) would have bid much less for the vehicle if at all. Appeal File, Exhibits 10, 11.

8. On September 25, 2006, the contracting officer sent another e-mail message reminding appellant of his obligation to remove the vehicle he had purchased. He was given a final extension of time, until close of business on September 29, to remove the vehicle. The e-mail notice apprised Mr. Lyda that if the vehicle was not removed, GSA would terminate his contract for default and assess liquidated damages. Appeal File, Exhibit 12.

9. Mr. Lyda responded to the contracting officer's e-mail message, stating that in his letter of September 14, 2006, which was both faxed and mailed to GSA, he had "declared a mis-description" of the vehicle in question and was seeking a full refund of the purchase price. He noted that when he arrived in Abingdon and actually saw the vehicle he tried to contact GSA's office, but was unable to speak with anyone. Appeal File, Exhibit 13.

10. The contracting officer issued a decision, terminating the contract for default for failure to remove the vehicle in accordance with the terms and conditions of the contract. GSA refunded the purchase price less a twenty percent deduction for liquidated damages. Appeal File, Exhibit 14. Mr. Lyda appealed that decision.

11. Mr. Lyda requested discovery of GSA, which was provided.

Discussion

Neither party disputes the facts as set forth above. Their disagreement is as to the legal import of the facts, and specifically as to what constitutes a misdescription so as to entitle appellant to cancel the sale for a full refund. Mr. Lyda asserts that this contract should be canceled and the liquidated damages imposed by GSA should be refunded to him. He believes he is entitled to invoke the misdescription remedy under the contract for two reasons: (1) inspection of property offered on GSAAuctions, while encouraged, is not a prerequisite to submitting a bid and receiving a contract; and (2) the warranty of description entitled him to relief because GSA did not adequately inform prospective bidders of the damages either by including these items (scratched windshield, warped front bumper, trunk lid dents, and damaged paint surfaces on the doors requiring that the vehicle be repainted) in the written description or by providing pictures that clearly depicted these defects. In short, Mr. Lyda contends that this situation amounts to a "misdescription by omission."

GSA maintains that the auctioned vehicle was accurately described and, therefore, not misdescribed. GSA also points out that all other warranties, including any warranty of condition, were expressly excluded under the terms and conditions of the sale. According

to GSA, the deficiencies complained of by Mr. Lyda amount to complaints about the condition of the vehicle and could easily have been discovered through inspection of the vehicle. As such, they do not constitute defects known only to GSA or information not readily available to prospective buyers prior to submission of bids. In view of this, respondent asserts that it is entitled to summary relief under the terms of the sale.

Summary relief is properly granted when there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *US Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001); *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 1996). In resolving summary relief motions, a fact is considered to be material if it will affect our decision and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant after a hearing. *John A. Glasure v. General Services Administration*, GSBCA 16046, 03-2 BCA ¶ 32,284 (citing *Celotex Corp.*; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

We have previously explained that “[o]n-line auctions are governed by rules prescribed by the organizations which conduct them. . . . Auctions conducted by GSA, through its GSAAuctions.gov website, follow this general principle: they are governed by terms and conditions promulgated by the agency. To participate in a GSA on-line auction, a person must agree to these terms and conditions.” *Darren R. Gentilquore v. General Services Administration*, GSBCA 16705, 05-2 BCA ¶ 33,117; see Finding 3.

The applicable terms and conditions specifically advised prospective bidders that the absence of stated deficiencies does not mean that none exist. In addition, bidders were strongly urged to inspect vehicles prior to bidding on them. Finding 3. It is settled law that to the extent deficiencies could reasonably have been discerned during an in-person inspection, the purchaser cannot establish a misdescription. *E.g.*, *Gentilquore*; *Michael R. Keenan v. General Services Administration*, GSBCA 16090, 04-2 BCA ¶ 32,730; *Kenneth G. Hanke v. General Services Administration*, GSBCA 14097, 97-2 BCA ¶ 29,247. The terms and conditions warrant only “that the property listed in the GSAAuctions.gov website will conform to its description.” The description on the website may have been incomplete, but it was not a misdescription. As the Board explained in *Larry J. McKinney v. General Services Administration*, GSBCA 16720, 05-2 BCA ¶ 33,119, the term “misdescription” connotes an inaccurate - meaning an erroneous or incorrect - description of something with which the describer is familiar. Mr. Lyda does not allege that any element provided in this description is inaccurate. Thus, the website description - the only thing that GSA warranted - was not a misdescription. *See also Hanke*.

Mr. Lyda does not contend that any of the deficiencies about which he now complains were hidden or could not have been ascertained in an in-person inspection. He believes that the Government should either act as the “eyes and ears of all bidders,” or, alternatively, make in-person inspection a mandatory prerequisite to submission of a bid. This is not the process contemplated by the terms and conditions of sale that he agreed to prior to bidding, which expressly warned that condition of the vehicle was not warranted, that the absence of indicated deficiencies did not mean that none existed, and that photographs should not be relied on. Finding 3. It was not reasonable, in light of these terms and conditions, to assume that the Government was obligated to act as the “eyes and ears” of the bidders. Rather, given the nature of these sales and the consequences of purchasing vehicles in this manner, it should have been clear to Mr. Lyda and other bidders that these auction transactions inevitably involve considerable risks and uncertainties, which are heightened when the prospective buyer chooses not to conduct an inspection prior to bidding. These inherent risks and uncertainties should be reflected in the price bid. *Keenan*.

Appellant submitted a valid bid, which was accepted by GSA. Appellant had no viable grounds for withdrawing his bid, which in effect is what he has done. Accordingly, GSA was within its rights to terminate the contract for default and assess liquidated damages as provided for under the terms of the auction sale. *John F. Collins v. General Services Administration*, GSBCA 14555, 98-2 BCA ¶ 30,004.

Decision

The Board grants respondent’s motion for summary relief and **DENIES** the appeal. GSA has properly withheld liquidated damages for the default.

CATHERINE B. HYATT
Board Judge

We concur:

ROBERT W. PARKER
Board Judge

MARTHA H. DeGRAFF
Board Judge